



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

January 30, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.  
Complainant

Complaint No. 2014-230

v.

Woodbine Board of Education (Cape May)  
Custodian of Record

At the January 30, 2015 public meeting, the Government Records Council ("Council") considered the January 20, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The GRC must conduct an *in camera* review of the responsive e-mails between Superintendent Towns and Ms. Lepore to determine the validity of the Custodian's assertion that the same is attorney-client privileged and exempt from disclosure under OPRA. *See Paff*, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

<sup>1</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>2</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>3</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Interim Order Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of January, 2015

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 3, 2015**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 30, 2015 Council Meeting**

**Harry B. Scheeler, Jr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-230**

**v.**

**Woodbine Board of Education (Cape May)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of all e-mails sent and received between Superintendent Lynda Towns (“Superintendent Towns”) and Marina Lepore, Esq., regarding the subjects “Scheeler v. Woodbine,” OPRA, Harry Scheeler, Sebastien Scheeler, due process, school board, Eric Harrison, Susan Hodges, GRC, “State v. Lynda Towns,” state monitor and James Riehman from 2012 to 2014.

**Custodian of Record:** Allen Parmelee  
**Request Received by Custodian:** March 11, 2014  
**Response Made by Custodian:** March 12, 2014  
**GRC Complaint Received:** May 21, 2014

**Background<sup>3</sup>**

**Request and Response:**

On March 11, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 12, 2014, the Custodian responded in writing denying access to three (3) e-mails as attorney-client privileged material. N.J.S.A. 47:1A-1.1. That day, the Complainant e-mailed the Custodian disputing that the e-mails were exempt simply because an attorney communicated with Superintendent Towns. The Complainant requested proof that Ms. Lepore actually represented Superintendent Towns.

**Denial of Access Complaint:**

On May 21, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed that the responsive records are subject to the attorney-client privilege exemption. The Complainant stated that only

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<sup>1</sup> Represented by Michelle J. Douglass, Esq., of Douglass, Kinniry (Northfield, NJ).

<sup>2</sup> Represented by Susan Hodges, Esq., of Archer & Greiner, P.C. (Haddonfield, NJ).

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

communications between an attorney and a client “in the course of the relationship and in professional confidence, are privileged.” N.J.S.A. 2A:84A-20. Further, the Complainant noted that the privilege is limited to “those situations in which” legal advice “is the subject of the relationship.” In re: Gonnella, 283 N.J. Super. 509, 512 (Law Div. 1989).

The Complainant contended that the Custodian’s denial of access did not comply with OPRA because it failed to include “specific reliable evidence sufficient to meet the statutorily recognized basis for confidentiality.” Courier Post v. Hunterdon Cnty. Prosecutor’s Office, 373 N.J. Super. 373, 382-83 (App. Div. 2003). The Complainant also contended that custodians must provide a reasonable explanation “without revealing information itself privileged or protected” that allows other parties to access the applicability of any cited exemptions. Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346, 354-55 (App. Div. 2005). *See also* Burke v. Brandes, 429 N.J. Super. 169, 178 (App. Div. 2012). The Complainant argued that the Custodian failed to provide enough information for him to reasonably determine whether the attorney-client privilege exemption applied to the responsive e-mails.

The Complainant noted that, even if the e-mails were exempt as attorney-client privileged material, the GRC has previously required disclosure of same with redactions thus disclosing all information not otherwise exempt. Mendes v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-184 (Interim Order dated August 24, 2010); Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated May 24, 2011); Scheeler v. Twp. of Mt. Laurel (Burlington), GRC Complaint No. 2012-83 (Interim Order dated April 30, 2013).

The Complainant thus requested that the GRC conduct an *in camera* review of the responsive e-mails and order disclosure of same with appropriate redactions, where applicable. The Complainant further requested that the GRC determine that he is a prevailing party entitled to an award of reasonable attorney’s fees. N.J.S.A. 47:1A-6.

#### Statement of Information:

On June 30, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on March 11, 2014. The Custodian certified that he performed a database search that located three (3) e-mails, all dated March 10, 2014. The Custodian affirmed that he determined that the e-mails were exempt as attorney-client privileged material and confirmed same with Custodian’s Counsel. The Custodian certified that he responded in writing on March 12, 2014 denying access to the responsive e-mails as attorney-client privileged material.

The Custodian asserted that the e-mails fit the attorney-client privilege exemption because Superintendent Towns consulted with Ms. Lepore as an attorney. Thus, all communications were deemed to be exempt from disclosure.

## Analysis

### Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Paff, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council<sup>4</sup> that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records . . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court stated that:

[OPRA] also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the Court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

Here, the Complainant filed his complaint with the GRC disputing that the responsive e-mails were exempt under the attorney-client privilege exemption. Specifically, the Complainant argued that simply communicating with an attorney did not automatically invoke the attorney-client privilege exemption. Further, the Complainant argued that the Custodian failed to provide

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<sup>4</sup> Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

an adequate description of how the record met the exemption. Conversely, in the SOI, the Custodian argued that Superintendent Towns consulted with Ms. Lepore on an issue. Based on the foregoing, it is necessary for the GRC to conduct an *in camera* examination of the e-mail.

Therefore, the GRC must conduct an *in camera* review of the responsive e-mails between Superintendent Towns and Ms. Lepore to determine the validity of the Custodian's assertion that the same is attorney-client privileged and exempt from disclosure under OPRA. *See Paff*, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.

### **Knowing & Willful**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

### **Prevailing Party Attorney's Fees**

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the responsive e-mails between Superintendent Towns and Ms. Lepore to determine the validity of the Custodian's assertion that the same is attorney-client privileged and exempt from disclosure under OPRA. *See Paff*, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver<sup>5</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index<sup>6</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>7</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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<sup>7</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo, Esq.  
Acting Executive Director

January 20, 2015